

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD MILLER**

Claimant

VS.

**U.S.D. NO. 259**

Respondent

Self-Insured

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Docket No. 234,535

**ORDER**

Both claimant and respondent appealed Administrative Law Judge Nelsonna Potts Barnes' October 28, 1999, Award. The Appeals Board heard oral argument in Wichita, Kansas, on March 10, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Michael L. Snider of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Richard J. Liby appearing for Robert G. Martin of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations contained in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant an 87.1 percent permanent partial general disability based on 74.2 percent work task loss and a 100 percent wage loss. The dollar amount of the Award was limited to the \$100,000 statutory maximum.<sup>1</sup>

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<sup>1</sup>See K.S.A. 44-510f(a)(3).

On appeal, claimant contends he is unable to engage in substantial and gainful employment and is therefore entitled to a permanent total award in the amount of the statutory maximum of \$125,000.<sup>2</sup>

Conversely, respondent appeals and contends that claimant is entitled to permanent partial general disability benefits based on a permanent functional impairment rating of 48 percent because the functional impairment rating exceeds his work disability.<sup>3</sup> Respondent argues claimant's work disability is limited to a maximum of 41.7 percent based on a 48.4 percent work task loss and at most a 35 percent wage loss.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board finds the Administrative Law Judge's Award should be modified from an 87.1 percent permanent partial general disability to a 74.2 percent permanent partial general disability.

The Administrative Law Judge found claimant's work task loss component of the work disability test was 74.2 percent by equally weighing Dr. P. Brent Koprivica's 100 percent opinion with Dr. John P. Estivo's 48.4 percent opinion. Dr. Koprivica examined and evaluated claimant at claimant's attorney's request on one occasion. In contrast, Dr. Estivo saw claimant on five occasions over a six-month period and provided claimant with treatment for his work-related low-back injury.

Vocational rehabilitation consultant, James Molski, prepared a list of work tasks claimant had performed in the jobs he had in the 15 years preceding his January 5, 1998, accident date. Dr. Koprivica reviewed Mr. Molski's list of work tasks and testified, "My opinion, based on Mr. Molski's identification of tasks, that's what I used as a basis along with the vocational information I had taken from him, it's my opinion he has a 100 percent loss of task ability." Dr. Koprivica was then asked if he had an opinion of whether or not claimant was capable of engaging in substantial and gainful employment. Dr. Koprivica replied, "My opinion is that he is not capable of any type of substantial, gainful employment at the present time."

Dr. Estivo also was requested to review the list of work tasks compiled by Mr. Molski. Dr. Estivo testified, based on the permanent restrictions he had imposed on the claimant as a result of his work-related low-back injury, that claimant has a 48.4 percent work task loss.

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<sup>2</sup>See K.S.A. 44-510f(a)(1).

<sup>3</sup>See K.S.A. 1997 Supp. 44-510e(a).

Dr. Koprivica's permanent work restrictions placed claimant in the light physical demand work category. In addition to a 20-pound lifting restriction, Dr. Koprivica's restrictions included posture type restrictions, such as limiting captive sitting of no more than 30 minutes; standing in one spot for five minutes; and if claimant was able to move around, standing for 30 minutes. Mr. Molski's work task list, however, contains certain work tasks that would be considered sedentary work tasks that claimant retained the ability to perform even based on Dr. Koprivica's permanent restrictions. For example, the first work task described under the Plumber job that claimant performed for respondent was a planning and clerical job claimant could perform standing or sitting. The first work task described under the heading Pool/Spa Installer/Repairer required claimant to personally contact potential customers and then estimate the cost of installation of the pool or spa which could be performed either sitting or standing with limited bending and stooping. Under the job description entitled Blow Mold Machine Supervisor, there were four work tasks listed that required claimant to complete paperwork and supervise employees which could be performed either sitting or standing.

The Appeals Board concludes Dr. Estivo's opinion concerning the percentage of work tasks claimant has lost as a result of his low-back injury is the most persuasive and credible work task loss opinion contained in the record. The Appeals Board finds that Dr. Koprivica based his 100 percent work task loss opinion on vocational criteria for the jobs described as a whole instead of relating each work task to claimant's permanent work restrictions. Therefore, the Appeals Board finds the work task loss component of the work disability test should be 48.4 percent instead of the 74.2 percent as found by the Administrative Law Judge.<sup>4</sup>

The Administrative Law Judge found, after respondent terminated claimant because it could not accommodate claimant's permanent restrictions, that claimant made a good faith effort to find appropriate employment. On the date of the regular hearing, March 31, 1999, claimant remained unemployed as his efforts to find appropriate employment had not been successful. Thus, the Administrative Law Judge found claimant's wage loss is 100 percent.<sup>5</sup>

The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant has a 100 percent wage loss. This conclusion is supported by claimant's participation in a job placement program that was offered by respondent from July 27, 1998, through September 14, 1998. The program was conducted by job placement specialist James A. Rucker. Because of his slow start, claimant did not complete the recommended 10 job contacts per week. But Mr. Rucker acknowledged that claimant

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<sup>4</sup>See K.S.A. 1997 Supp. 44-510e(a).

<sup>5</sup>See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

presented himself effectively and positively to potential employers and followed up on all but two of the nine contacts supplied by Mr. Rucker.

At the regular hearing, claimant testified he still was seeking employment and also was investigating into homebound business opportunities. At the regular hearing, claimant offered, and it was admitted into evidence, a list of employers claimant had contacted between July 1998 and March 1999. The list showed that claimant had made contacts with 94 employers during this period. This shows claimant made a good faith attempt to find suitable employment.

The Appeals Board also agrees with the Administrative Law Judge's conclusion that claimant is not permanently and totally disabled. At the time of claimant's January 5, 1998, accident, he was 38 years old and, although not a high school graduate, had obtained a GED. Mr. Molski, utilizing Dr. Estivo's permanent work restrictions, testified that claimant probably retained the ability to find other employment in the open labor market realistically in the \$7.00 to \$7.50 per hour range for entry level jobs. Mr. Rucker testified, in his opinion, there were jobs in the open labor market claimant could qualify for with his experience and within his current physical restrictions that paid in the range of \$9.81 to \$12.00 per hour.

The Appeals Board, therefore, concludes the greater weight of the credible evidence contained in the record established claimant retains the ability to perform substantial and gainful employment. Thus, claimant is not entitled to a permanent and total disability award. But claimant has sustained a substantial work disability based on a work task loss of 48.4 percent and a wage loss of 100 percent. Claimant is, therefore, entitled to a 74.2 percent permanent partial general disability for the statutory maximum award of \$100,000.

The findings and conclusions as set forth in the Administrative Law Judge's Award need not be repeated in this Order. Those findings and conclusions that are not inconsistent with the findings and conclusions set forth in this Order are adopted by the Appeals Board as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' October 28, 1999, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Donald Miller, and against the respondent, U.S.D. No. 259, a qualified self-insured, for an accidental injury which occurred January 5, 1998, and based upon an average weekly wage of \$497.71 through May 28, 1998, and \$568.17 after May 28, 1998.

Claimant is entitled to 20.42 weeks of temporary total disability compensation at the rate of \$331.82<sup>6</sup> per week or \$6,775.76, followed by 265.57 weeks of permanent partial disability compensation at the rate of \$351.00<sup>7</sup> per week or \$93,215.07 and followed by one final payment of \$9.17 for a 74.2% permanent partial general disability, making a total award of \$100,000.

As of August 30, 2000, there is due and owing claimant 20.42 weeks of temporary total disability compensation at the rate of \$331.82 per week or \$6,775.76, followed by 138.43 weeks of permanent partial compensation at the rate of \$351.00 per week in the sum of \$48,588.93 for a total of \$55,364.69, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$44,635.31 is to be paid for 127.14 weeks at the rate of \$351.00 per week and followed by one final payment of \$9.17 until fully paid or further order of the Director.

All authorized medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2000.

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BOARD MEMBER

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**DISSENT**

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<sup>6</sup>Claimant's date of accident is January 5, 1998, and respondent terminated claimant on May 28, 1998. During this period, claimant was paid temporary total disability compensation based on an average weekly wage of \$497.71 which did not contain fringe benefits costs.

<sup>7</sup>After May 28, 1998, claimant's average weekly wage was \$598.17 because fringe benefits were terminated resulting in a permanent partial general disability compensation rate limited to the maximum of \$351.00 per week.

I respectfully disagree with the majority and find that claimant is essentially unemployable. Therefore, claimant should be awarded a permanent total disability.

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Robert G. Martin, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director